IN THE SUPREME COURT OF FLORIDA

DARIUS M. KIMBROUGH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 84,989

APPEAL FROM THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT IN
AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Kimbrough relies on the argument and authority set forth in the Initial Brief of Appellant in reference to the following points on appeal:

POINT IV

KIMBROUGH'S DEATH SENTENCE IS DISPROPORTIONATE IN CONTRAVENTION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. THE TRIAL COURT IMPROPERLY WEIGHED THE MITIGATING CIRCUMSTANCES.

POINT VI

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION BY EXCUSING FOR CAUSE ONE QUALIFIED JUROR OVER DEFENSE OBJECTION.

POINT VII

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A SEXUAL BATTERY.

POINT VIII

SECTION 921.141, FLORIDA STATUTES IS UNCONSTITUTIONAL.

POINT I

THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

In the initial brief, appellant argued that the trial court erred by not granting an acquittal to the charges because the State's evidence is legally insufficient to support a guilty verdict. The state answered that whether the evidence failed to exclude the appellant was for the jury to determine. (P. 27) This is not the proper legal analysis.

This Court has the responsibility on every appeal to determine whether **as a matter of law** the evidence was sufficient to uphold a conviction. Moreover, this Court has a constitutional responsibility to review each death sentence to insure that each sentence is supported by substantial competent evidence.

In the initial brief, appellant argued that the DNA testing results were unreliable because the court did not perform a Frye[1] inquiry as provided by this Court in Hayes v. State, 20 Fla. L. Weekly S296, S299 (Fla. June 22, 1995). The state contends that the appellant's argument is disingenuous because

[1] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

they did not call their own DNA expert.[2] The state further argued that this Court has taken "judicial notice that DNA test results are generally accepted as reliable in the scientific community." This argument being promoted by the state is a smoke screen from the essential issue: Whether the admission into evidence of expert opinion testimony of the DNA comparison testing procedures was done with a proper Frye inquiry. This is required because "DNA testing methodology, while an extremely important new identification technique, has not yet reached the level of stability of other forms of identification such as fingerprints comparisons." Hayes at S298 Despite the state's collateral arguments, the fact remains that a Frye inquiry was not conducted in this case to make a record that the test procedures and comparison procedures were done consistent with the most up to date scientific protocols. Such an inquiry insures that the results upon which the experts testifies upon has the highest degree of reliability.

The state conceded in their answer that the most substantial competent evidence to support the conviction was the DNA comparison testing because it is the only evidence that conclusively places the appellant at the crime scene "at or near the time she was raped." The DNA comparison testing results were not demonstrated to be reliable because a proper Frye inquiry was not performed. As in Hayes, this court must reverse the

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[2] FDLE Crime Analyst David Baer performed the DNA testing in this case. The defense made timely objection to state witness David Baer being declared an expert in the area of DNA testing.

appellant's conviction and order a new trial providing the state an opportunity to demonstrate that the DNA comparison testing results was reliable.

POINT II

THE TRIAL COURT ERRED BY PROHIBITING THE DEFENSE TO INTRODUCE TESTIMONY ABOUT OTHER CRIMES, WRONGS OR BAD ACTS WHERE SAID TESTIMONY WAS RELEVANT TO A MATERIAL ISSUE AT TRIAL.

The state argues that the similar fact evidence that was excluded by the trial court was proper because "it did not constitute a fingerprint to the murder of Denise Collins." (P.42) The state emphasized the trial court's ruling wherein the trial court found that the crimes were not similar enough because the victim's boyfriend (Gary Boodhoo) stopped the beating before he killed Denise Collins and got away from her. The trial court clearly abused its discretion because the bad acts of Boodhoo was sufficiently similar to be relevant to the issue of identity and motive of the killer.

The murder in this case had two unique characteristics: the victim was beaten to death, and the perpetrator likely used a ladder to reach the second floor balcony and entered the victim's apartment by the sliding glass door on that balcony. Boodhoo was a suspect in this case because he had been with the victim the night of the murder and was attempting to reconcile the past romantic relationship with the victim. The defense sought to introduce similar past conduct of Boodhoo that could assist the jury in identifying the murderer in this case. That evidence was that Boodhoo had beaten the victim in the past when he had an argument with the victim, and that days before the murder he had attempted to enter the victim's apartment with a ladder in the

same manner as the likely murderer. The combination of these two past acts by the victim's boyfriend raises it to a sufficient quantum of similarity to permit it into evidence.

The state's argument that the defense had the opportunity to convince the jury that Boodhoo was the likely murderer therefore any error was harmless is not persuasive. The fact is that the exclusion of the Williams Rule evidence by the trial court made the jury's dismissal of the appellant's hypothesis of innocence that Boodhoo was the likely murderer a mere formality and can not therefore be harmless error.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION BY NOT FINDING THE STATUTORY MITIGATOR OF AGE AT THE TIME OF THE OFFENSE.

The state argues that the trial court was correct to dismiss the statutory mitigator of age because the defense failed in its burden to show that the defendant was impaired or was immature at the time of the offense. The state fails to recognize that age is **presumptively mitigating** when the murder is committed by a teenager. Unless the state can demonstrate that a teenage defendant has exceptional maturity, the court must find that the statutory mitigating factor is proven.

The state has confused this court's pronouncements on the age mitigator where the defendant is no longer a teenager. Where a defendant is in his or her twenties or older at the time of the offense, the age mitigator does not presumptively apply unless it can be shown with competent evidence that the defendant suffers from a mental impairment that reduces the mental age of the defendant from the physical age.

In the instant case, the defense conclusively proved that the defendant had the physical age of a teenager. Since the state presented no evidence that the defendant had exceptional maturity the age mitigating factor was proven. The failure of the trial court to find age as a statutory mitigating factor was error.

POINT V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

In making its finding that the murder of Collins was especially heinous, atrocious or cruel murder the court stated:

> The last moments of Denise Collins life were a nightmare. First, she discovered a stranger in her bedroom, then she was raped by that stranger. After that she was beaten, and her head was banged against the wall. She had to be in unspeakable fear and pain.

Under Florida law, aggravating circumstances "must be proved beyond a reasonable doubt." Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989). Moreover, the state must prove **each element** of the aggravating circumstance beyond a reasonable doubt. Banda v. State, 536 So.2d 221, 224 (Fla. 1988). The appellant submits that the state failed to meet its burden in this case.

The state does not deny that there is evidence lacking to support this aggravating circumstance. To gloss over this evidentiary shortfall the state contends that where there is gaps in the evidence the trial court should rely upon "common sense" to fill these gaps. This court should reject this argument and follow the holding in Jackson v. State, 451 So.2d 458 (Fla. 1984). In Jackson, this court held that the facts of that case did not support a finding that the murder was especially heinous, atrocious, or cruel. Specifically, the defendant shot the victim in the back, put him in the trunk of a car while he was still

alive, wrapped him in plastic bags, and subsequently shot the victim again while he was still alive. This Court held:

> When the victim becomes unconscious the circumstances of further acts contributing to his death cannot support a finding of heinousness. The record contains no evidence that [the victim] remained conscious more than a few moments after he was shot in the back the first time, and he therefore was incapable of suffering to the extent contemplated by this aggravating circumstance.

Jackson at 463.

Appellant submits that there was no testimony that the victim was aware of her impending death. Furthermore, there was no testimony that the victim suffered any pain as a result of the fatal blow to the head. Moreover, there was no physical evidence offered by the state to indicate how long the victim suffered after being struck, and more importantly, whether she was conscious after the fatal blow was struck. In fact, that same evidence suggests quite strongly that she was not.

The jury in this case ought not to have had before them the consideration that the murder was especially heinous, atrocious or cruel, because clearly as a matter of law the evidence was insufficient to support the aggravator. Moreover, the trial court should not have found this aggravating circumstance. Clearly, the state presented no evidence that the victim suffered any pain at all.

The argument by the State that the error is harmless should be rejected. It is submitted that the erroneous presence of this particular instruction led the jurors to conclude, and

reasonably so, that they were entitled to consider whether in their opinion this murder was especially heinous, or cruel and to base the death recommendation on this erroneous consideration. Furthermore, the trial court relied upon this aggravating factor in determining that death was the appropriate sentence in this case. A lay person would inevitably conclude that these murders were especially heinous, atrocious or cruel. The State cannot meet its burden of showing beyond a reasonable doubt that the erroneous presence of this particular instruction in the face of a timely objection did not affect the recommendations of death by the jury. See State v. Lee, 531 So.2d 133 (Fla. 1988); Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

The death sentence must be reversed and the matter remanded for a new penalty phase with a new jury due to violations of the Fifth, Sixth, Eighth and Fourteenth Amendments. These violations were caused by the presence of an improper instruction and finding by the trial court that was wholly unsupported by the evidence. Timely and specific objections by defense counsel were overruled. The presence of that particular instruction under the facts of this case was so susceptible to confusion and misapplication by the jury that distortion of the reasoned sentencing procedure required by the Eighth Amendment as occurred; the recommendation of the jury is unreliable and flawed.

CONCLUSION

Based on the argument and authority previously set forth, this Court is respectfully asked to provide the following relief:

POINTS I and II: to reverse the judgement and conviction and remand for a new trial;

POINTS III, V, VI, VII: to vacate the death sentence and remand for a new penalty proceeding before a new jury.

POINTS IV and VIII: to vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118 in his basket at the Fifth District Court of Appeal and mailed to Mr. Darius Kimbrough, #374123 (42-1131-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 29th day of April, 1996.

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